Supreme Court, U.S.
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No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE GOVERNMENTS OF THE KINGDOM OF THE NETHERLANDS AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

"Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

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INTERESTS OF *AMICI CURIAE*

The Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland ("U.K.") (collectively "the Governments") are committed to the rule of law, including the promotion of, and protection against violations of, human rights. It has been the longstanding view of the Governments that a State must protect the human rights of those within its jurisdiction, and must provide appropriate remedies for violations of those rights.[1]

The Governments firmly believe that corporations should not be able to act with impunity vis-à-vis human rights issues, and that they should respect human rights. Accordingly, the Governments have recognized that the operations of corporations can have both beneficial and detrimental impacts on the enjoyment of human rights by those affected by their operations and are engaged in multilateral dialogue to determine how best to address this at the international level.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici Curiae*, its members, and its counsel contributed monetarily to the preparation of submission of this brief. Both Petitioners and Respondents have granted their consent to the filing of all amicus briefs.

[2] For example, *see* U.K. Foreign and Commonwealth Office, Business and Human Rights, http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/; *see also* chapter on freedom and prosperity in Human Rights Memorandum of the Dutch Government 'Responsible for Freedom', available at http://www.minbuza.nl/en/key-topics/human-rights/dutch-human-rights-policy/human-rights-strategy-2011.

Nevertheless, just as international law imposes human rights obligations on States, it imposes restraints on the assertion of jurisdiction by one State over civil actions between persons that primarily concern another State. Jurisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity. The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States ("U.S."). Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute.

As such, the Governments have maintained their concern with the extraterritorial application of U.S. law over a long period of time. They have expressed their concern in numerous amicus briefs submitted to this Court, including a brief by the Governments at an earlier stage of these proceedings.[3] The Governments, along with Ireland, filed a joint amicus brief detailing similar concerns on the exercise of extraterritorial antitrust jurisdiction by the U.S. in *F. Hoffmann-La Roche v. Empagran, S.A.*, 542 U.S. 155 (2004) ("*Empagran*").[4] The U.K. also submitted a

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[3] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents (No. 10-1491) (filed Feb. 3, 2012); *Id.* at 2-4, nn. 3-6.

[4] Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of Petitioners, *F. Hoffmann-La Roche v.*

joint brief with the Governments of Australia and Switzerland dealing with extraterritorial jurisdictional issues during this Court's only prior consideration of the Alien Tort Statute ("ATS") in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) ("*Sosa*").[5]

The Governments remain deeply concerned about the failure by some U.S. courts to take account of the jurisdictional constraints under international law when construing the ATS, which in turn has led those courts to entertain suits by foreign plaintiffs against foreign defendants for conduct that took place entirely in the territory of a foreign sovereign. In this regard, for example, the U.K., Germany, Switzerland and South Africa sent diplomatic notes to the U.S. reasserting their opposition to a broad assertion of extraterritorial jurisdiction in an ATS case based on South Africa's Apartheid history.[6]

This brief is intended to set out the views of two nations that historically have been concerned with the extraterritorial exercise of jurisdiction by the U.S. courts because of its inconsistency with international law. It echoes the views expressed by other governments in ATS, antitrust and securities

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Empagran, S.A., 542 U.S. 155 (2004) (filed Feb. 3, 2004) (No. 03-724), 2004 U.S. S. Ct. Briefs LEXIS 104.

[5] Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) (filed Jan. 23, 2004), 2004 U.S. S. Ct. Briefs LEXIS 910.

[6] *See* Diplomatic notes in Appendices B-E, Brief for the United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919) (filed Feb. 11, 2008), 2008 U.S. S. Ct. Briefs LEXIS 1311.

cases before this Court—including the Governments of Australia, Belgium, Canada, France, Germany, and Japan.[7] This brief is purely intended to set out the Governments' view of the most relevant international legal principles and takes no position on the underlying factual and legal disputes between the parties to this particular case. Accordingly, the Governments are filing this amicus brief in support of neither party.

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[7] Brief of the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioners on Certain Questions in their Petition for a Writ of Certiorari, *Rio Tinto PLC v. Sarei*, pet. for cert. filed, (No. 11-649) (filed Dec. 28, 2011); Brief for the Republic of France as *Amicus Curiae* in Support of Respondents, *Morrison v. National Australian Bank Ltd.*, 130 S.Ct. 2869 (2010) (No. 08-1191) (filed Feb. 26, 2010) 2010 U.S. S. Ct. Briefs LEXIS 176; Brief of the Government of the Commonwealth of Australia as *Amicus Curiae* in Support of the Defendants-Appellees, *Morrison v. National Australian Bank Ltd.*, (2010) (No. 08-1191) (filed Feb. 26, 2010), 2010 U.S. S. Ct. Briefs LEXIS 172; Brief of the Governments of the Federal Republic of Germany and Belgium as *Amici Curiae* in Support of Petitioners, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) (filed Feb. 3, 2004) 2004 U.S. S. Ct. Briefs LEXIS 112; Brief for the Government of Canada as *Amicus Curiae* Supporting Reversal, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, (2004) (No. 03-724) (filed Feb. 3, 2004) 2004 U.S. S. Ct. Briefs LEXIS 105; Brief of the Government of Japan as *Amicus Curiae* in Support of Petitioners, *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, (2004) (No. 03-724) (filed Feb. 3, 2004) 2004 U.S. S. Ct. Briefs LEXIS 106.

STATEMENT OF THE CASE

This case (which is quite different from *Sosa* factually)[8] is typical of the ATS cases that have proliferated in the lower courts since 2004. In such cases, U.S. class action counsel have assembled a class of foreign citizens or residents who have allegedly been injured by actions of a foreign government in its own territory; and most of the defendants in these cases are foreign corporations that are alleged to have encouraged, assisted, or participated in the foreign government's activities. Generally, as in this case, the challenged conduct has no nexus to the U.S. The corporations are the principal targets of these cases because claims made directly against foreign States or governments would be dismissed on grounds of sovereign immunity.

SUMMARY OF ARGUMENT

This action, like *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *pet. for cert. filed*, 80 U.S.L.W. 335 (Nov. 23, 2011) (No. 11-649) ("*Rio Tinto*"), is a typical post-*Sosa* ATS case.[9] It involves claims that a large class of foreign citizens and residents has been mistreated in the territory of a foreign State—and that the plaintiffs should be compensated by a substantial damages award for alleged violations of "the law of nations" against non-U.S. corporations that carried out business in the territory of the foreign State. The attractiveness of the U.S. as a forum for foreign plaintiffs can in part

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[8] *Sosa* was a suit by a single Mexican citizen as a result of a cross-border kidnapping by another Mexican citizen, alleged to be acting on behalf of U.S. government officials.

[9] *See also Bauman v. DaimlerChrysler Corp.*, 676 F.3d 774 (9th Cir. 2011), *pet. for cert. filed*, (Feb. 6, 2012) (No. 11-965).

be traced to decisions by the U.S. to accord private plaintiffs a set of advantages that most other countries have not accepted. Acceptance of such cases where there is no link to the forum concerned increases the risk of forum shopping by foreign plaintiffs, thereby circumventing the competent legal system.

The Governments strongly believe that such allegations of human rights violations should be dealt with in an appropriate forum, *respecting international law principles of jurisdiction.* In relation to claims of a civil nature, the bases for the exercise of civil jurisdiction under international law are generally well-defined. They are principally based on territoriality and nationality. The basic principles of international law have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad that have no sufficiently close connection with the forum State.

For the U.S. to allow the ATS to provide the basis for such claims would clearly interfere with other nations' sovereignty and be plainly inconsistent with international law and the concept of international comity recognized by this Court in *Sosa, Empagran*, and *Morrison v. Nat'l Austl. Bank Ltd*, 130 S. Ct. 2869 (2010) ("*Morrison*"). It could also interfere with and complicate efforts within the territorial State to remedy human rights abuses that may have occurred within its own territory.

Accordingly, the Court should apply its repeatedly recognized presumption against extraterritorial jurisdiction to the ATS.

ARGUMENT

Ever since Chief Justice Marshall's early decisions involving international shipping disputes, this Court has recognized that international law places important limitations on the ability of the U.S. to exercise jurisdiction over overseas individuals and situations. In 1804, this Court stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," unless the act contains "express words or a very plain and necessary implication" to the contrary. *Alexander Murray, Esq. v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

Eight years later in *Schooner Exchange v. McFadden*, 11 U.S. 116 (1812), the Chief Justice's opinion for the Court made very clear that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute...[and]...is susceptible of no limitation not imposed by itself." *Id.* at 136.

In a third important early decision, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), the Court emphasized the equality of sovereigns: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another." *Id.* at 122.

These basic principles are as important today as they were in the era when the ATS was enacted, and they have an importance that goes beyond the mere adjudication of a particular dispute. As one respected commentator has explained, "[t]he legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they

are concerned with the allocation . . . of competence to regulate daily life – that is, the competence to secure the *differences* that make each State a distinct society."[10]

I. THE COURT'S DECISION IN *SOSA* CONTINUED THE U.S. TRADITION OF CAREFUL DEFERENCE TO INTERNATIONAL LAW, BUT DID NOT ADDRESS OR RESOLVE THE CORE JURISDICTIONAL ISSUE RAISED BY THIS AND MANY OTHER POST-*SOSA* ATS CASES

Sosa was an ATS lawsuit filed by a Mexican national against another Mexican national, Jose Francisco Sosa, for a cross-border kidnapping from Mexico to the U.S., which was allegedly carried out at the behest of U.S. government officials. *Sosa*, 542 U.S. at 697. *See also Alvarez-Machain v. U.S.*, 331 F. 3d 604, 608 (9th Cir. 2003) (summarizing factual background).

This Court dismissed Alvarez-Machain's ATS claims because his allegations of unlawful detention, for no more than a day, were not considered to be a violation of any universally accepted, and clearly defined, international law norm. *Sosa*, 542 U.S. at 738. Since *Sosa* was the first modern ATS case that the Court had accepted, it was necessarily concerned with the need to define what types of acts might be considered violations of the "law of nations" in the present era, and showed careful deference to international law rules in determining the existence, and scope, of any such international norms.

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[10] Vaughan Lowe and Christopher Staker, *Jurisdiction*, in *International Law* 314 (Malcolm D. Evans ed., 3rd ed. 2010) (emphasis in original).

The Court understood that recognizing new causes of action for overseas conduct could lead to conflicts among sovereigns over: (i) what constitutes violations of international law, (ii) which sovereign(s) had the right to try to take responsive action in their courts, and (iii) what kind of civil remedies might be appropriate. Any "attempts by federal courts to craft remedies for the violation of new norms of international law" raise "risks of adverse foreign policy consequences" and "should be undertaken, if at all, with great caution." *Id.* at 727-28.

A. The jurisdictional basis for any new causes of action under the ATS should be recognized with the same level of universality and specificity as the three original causes of action

The Court concluded that the ATS, when enacted, was meant to provide remedies for three types of offenses: violation of safe-conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 724. Crucially, Congress' decision in 1789 to provide aliens with remedies for these three types of violations did not conflict with the territorial sovereignty of any other nation. For these three original causes of action provided for by the ATS, it was also accepted that *procedurally* each nation could exercise jurisdiction over those specific claims.

At the time of the ATS' enactment, it was accepted that any nation could punish or provide a remedy for acts of piracy on the high seas.[11] It was also generally agreed that ambassadors serving abroad should have a remedy in foreign courts if they suffered a tort or

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[11] *Sosa*, 542 U.S. at 762.

their property rights were violated.[12] Lastly, every nation was obliged to honor grants of "safe-conduct" within their sovereign territory, or foreign territory they controlled in wartime.[13]

Sosa's requirement that new rules of international law be clearly accepted and defined internationally before constituting the proper basis for an ATS claim should also apply to the identification of a proper jurisdictional basis for any new claims. Even where there is evidence of agreement amongst States, through State practice and opinio juris, that certain acts can constitute the violation of international rules, that consensus does not also mean that a State may, as of right, exercise extraterritorial jurisdiction over those acts. Instead, there must be corresponding agreement amongst States that such an exercise of jurisdiction is permitted by an identifiable principle of jurisdiction under international law.

B. *Sosa* did not raise the same level of jurisdictional concern that this case and *Rio Tinto* do, because there was a sufficiently close nexus with the U.S.

In *Sosa*, the plaintiff was kidnapped in Mexico, but transported across the border to the U.S. against his

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[12] Emerich de Vattel wrote in 1758 that "[w]hoever offers any violence to an ambassador, or any other public minister, not only injures the sovereign which whom this minister represents, but he also hurts the common safety and well-being of nations; he becomes guilty of an atrocious crime towards the whole world." Emerich de Vattel, *The Law of Nations* 529 (1805 edition).

[13] Vattel wrote that "he who promises security by a safe-conduct, promises it where he is master, not only in his territories but likewise where any of his troops may be." *Id.* at 482. *See generally* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006).

will, allegedly under the direction of U.S. officials. *Id.* at 697-98.

The fact that some of the events in question occurred on U.S. territory provided a factual nexus with the U.S. that is totally absent from this case, *Rio Tinto* and most of the other post-*Sosa* ATS cases decided by the U.S. courts. The risk of conflict with another sovereign nation is much less likely where the U.S. is providing an ATS remedy for those injured by acts committed by individuals on U.S. soil (whether wholly or partially).

II. INTERNATIONAL LAW AND THE DECISIONS OF THIS COURT ONLY ALLOW THE EXERCISE OF EXTRATERRITORIAL CIVIL JURISDICTION WHERE THE CHALLENGED ACTS AND/OR PARTIES HAVE A SUFFICIENTLY CLOSE FACTUAL CONNECTION TO THE FORUM STATE

The Governments contend that it is now widely accepted that an internationally recognized principle must be identified before a State can exercise extraterritorial civil jurisdiction.[14] In order for the ATS to apply to "a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the U.S.," as the Court framed the pending question, the cause of action must be based on a close connection with the U.S. by virtue of

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[14] The modern International Court of Justice has required States to prove a relevant basis of jurisdiction. *See* The Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6). *See also* Anglo Norwegian Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18), and Malcolm N. Shaw, *International Law* 656 (6th ed. 2008).

one of the commonly recognized principles of jurisdiction (*e.g.* nationality).

It is clearly established that the basis for jurisdiction is always grounded in a sufficiently close nexus to the forum State. The only exception is universal criminal jurisdiction. Accordingly, it is axiomatic that the exercise of *civil* jurisdiction by a State will always depend on "there being *between the subject matter and the state exercising jurisdiction a sufficiently close connection* to justify that State in regulating the matter and perhaps also to override any competing rights of other States."[15]

Two such nexuses are well-known and widely recognized under international law: territoriality and nationality. Each State may regulate activity that occurs in its own territory (the "territorial principle" of jurisdiction).[16] It may also exercise extraterritorial jurisdiction in relation to the conduct of its nationals, or domiciled individual residents (the "nationality" or "active personality principle").[17]

Jurisdiction has sometimes—but not regularly—been accepted where the necessary nexus could be based on some other principle. One of these allows extraterritorial jurisdiction based on the nationality of the victim (the "passive personality principle"), although this has primarily been limited to the exer-

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[15] Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law* 457-58 (9th ed. 1992) (emphasis added); *See also* Bernard H. Oxman, Jurisdiction of States, *in* Encyclopedia of Public International Law (Rudolf Bernhardt, ed., 1997).

[16] *See The Apollon*, 22 U.S. 362, 370 (1824).

[17] Restatement (Third) of Foreign Relations Law of the United States (hereinafter, "Restatement") § 402(2) (1987).

cise of criminal jurisdiction.[18] In addition, this Court has sometimes allowed for exercise of U.S. extra-territorial jurisdiction under the internationally controversial "effects doctrine", where the nexus was that certain overseas activities had a substantial adverse effect within the U.S. *See, e.g., Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993). The "protective principle" of jurisdiction also allows for criminal jurisdiction over foreign acts that threaten a nation's national security.[19]

International law imposes the requirement of a sufficiently close nexus to the forum asserting jurisdiction, in order to minimize conflicts between States and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests.

The one exception to the requirement of a sufficiently close nexus to the forum State, to date, is the so-called "universality principle", which has been clearly confined to the context of criminal jurisdiction, and allows each State to exercise jurisdiction over a limited category of crimes so heinous that every State has a legitimate interest in their repression, regardless of the absence of a sufficiently close connection to the perpetrator, the victim, or the crime itself.

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[18] Passive personality jurisdiction allows criminal jurisdiction "over acts that harm a State's citizens abroad." *United States v. Yousef*, 327 F. 3d 56, 91 n.24 (2d Cir. 2003).

[19] *Restatement*, § 402(3), cmt. f.

A. Establishing a sufficiently close factual nexus to the forum State

The foregoing principles of jurisdiction mean that in order for the ATS to allow "a cause of action for violations of the law of nations occurring *within the territory of a sovereign other than the United States*," the cause of action must be based on a sufficiently close connection with the U.S.

Thus, the Governments respectfully submit that the principle of nationality of the defendant (or "active personality jurisdiction") is a proper basis on which the U.S. may apply the ATS extraterritorially.[20] This principle of jurisdiction is very clearly asserted (and accepted) in State practice, and is well established in international law. Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, § 138 at 462 (9th ed. 1992); Restatement of Foreign Relations, § 402(2); *Blackmer v. United States*, 284 U.S. 421, 437 (1932). In *The Nottebohm Case*, the International Court of Justice ("ICJ") clarified that this well-established principle of jurisdiction requires "a legal bond having as its basis a social fact of attachment, a *genuine connection* of existence, interests, and sentiments, together with the existence of reciprocal rights and duties" (emphasis added).[21] Accordingly, the Governments consider

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[20] The nationality principle of jurisdiction is also sometimes referred to as the "Active Personality" Principle. Bruno Simma & Andreas Th. Muller, Exercise and Limits of Jurisdiction, *in* The Cambridge Companion to International Law 142 (James Crawford ed., 2012) (stating that the "Active Personality principle entitles a state to assert jurisdiction over crimes committed by its nationals abroad").

[21] The Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

that the extraterritorial application of the ATS to acts committed by American individuals, corporations, and other U.S. entities in foreign sovereign territory, would be consistent with international law. Some scholars have suggested this is in fact what Congress did.[22]

This active personality jurisdiction could also be potentially applied to acts committed abroad by an alien U.S. resident so long as a "genuine connection" between the defendant and the U.S. could be established. Accordingly, in historic cases, such as *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), where the defendant was physically in the U.S. when served with the lawsuit, and had been resident in the U.S. for more than nine months before he was served, it may be possible to prove the requisite close connection to establish active personality jurisdiction over the individual where there is a clear legal bond between him and the forum State.[23] Furthermore, in *Filartiga* there had been an unsuccessful effort to

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[22] Curtis Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, uploaded June 7, 2012, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063921.

[23] *Filártiga v. Peña-Irala*, 630 F. 2d at 878-89. The defendant in *Filartiga* was not a legal resident, but an alien who had overstayed his visa and was scheduled for deportation. *Id.* However, it is now accepted that domicile can still be acquired where residence may be unlawful. For example, in the U.K., the House of Lords has ruled that domicile can be acquired in such circumstances. *See Mark v. Mark* [2005] UKHL 42, [2005] 1 A.C. 98. "In matters of civil status as opposed to political status, it is in everyone's interests that the affairs of long-term residents are governed by the laws of the country with which they are so closely connected. It is not a matter of the person benefitting from unlawful action: *domicile gives rise to liabilities as well as rights.*" CMV Clarkson & Jonathan Hill, *The Conflict of Laws* 318 (Oxford University Press 4th ed. 2011) (emphasis added).

initiate a criminal action in Paraguay, which could be considered an attempt at exhaustion of local remedies (discussed infra at p. 33-34). *Id.* at 878. Given these realities, the Governments are not suggesting that *Filartiga* be overruled.

B. The other bases that plaintiffs have frequently used for ATS assertions of jurisdiction fall short of the nexus required by international law

Nonetheless, the ICJ has recognized that the type of universal civil jurisdiction argued for by plaintiffs in ATS cases "has not attracted the approbation of States generally."[24] An allegation of an abuse of a "jus cogens" norm committed anywhere in the world, cannot alone justify the civil jurisdiction of the U.S. courts.[25] Such jurisdiction, without any underpinning of a clear connection with the forum (i.e. truly "universal" jurisdiction), is only well established in the criminal context.

Although universal criminal jurisdiction is permitted in respect of a narrow category of international norms, it does not give rise to a corresponding basis for civil jurisdiction. International law does not

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[24] Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 48 (Feb. 14) ("Arrest Warrant Case") (Opinion of Judges Higgins, Kooijmans and Buergenthal).

[25] *See* Immunities of The State (Germany v. Italy: Greece Intervening), 2012 I.C.J. ¶ 95 (Feb. 3) *available at* http://www.icj-cij.org/docket/files/143/16883.pdf (citing Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, 2006 I.C.J. 6, ¶¶ 64, 125 (Feb. 3)) (allowing foreign court proceedings to progress against a sovereign nation presents a fundamental conflict with that nation's sovereignty, and therefore, the question of immunity must be decided at the beginning of the claim).

develop through automaticity; it develops through an accumulation of State practice.

Importantly, it is widely recognized that criminal and civil jurisdiction are two distinct regimes. Extrapolating universal civil jurisdiction from the existence of universal criminal jurisdiction is not a proper application of international law: in particular, it is not consistent with the way in which international law develops. Such a principle must first be well-established and practiced by States to emerge as a new basis of civil jurisdiction under international law.

To allow extraterritorial jurisdiction in civil matters to be solely dependent on the allegations made in the claim would force each court to consider the merits at the outset, and would allow plaintiffs to circumvent the international law requirement of a clear factual nexus with the forum "simply by skilful construction of the claim."[26]

C. The presence of a U.S. corporate affiliate is not a sufficient basis to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S.

The Governments consider that this Court's decisions under the Due Process clause of the 14th Amendment to the Constitution are entirely consistent with international law; and thus, there is no basis for a nation to exercise general jurisdiction over a foreign corporation for activities having no close connection with the forum without its consent. *See*

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[26] *Id.* ¶ 82.

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011). In *Goodyear*, the Court asked "are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?" *Id.* at 2850. The Court answered with a unanimous "no". *Id.* at 2851. In order to establish "general jurisdiction" over a foreign corporation, its contacts with the forum must be "so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* at 2851.

The Solicitor General's Amicus Brief supporting the Defendants in *Goodyear* emphasized that, "[A] State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests."[27]

III. THE STATES SUBMITTING THIS BRIEF APPLY IN THEIR OWN COURTS JURISDICTION-LIMITING PRINCIPLES CONSISTENT WITH WHAT THEY ARE URGING THIS COURT TO ACCEPT UNDER INTERNATIONAL LAW

The courts of the U.K. and the Netherlands would not allow the plaintiffs to bring the kind of "foreign cubed" tort case typified by this action. Rather, the courts in each nation generally insist on a sufficiently close nexus with the forum based on the territoriality or active personality principles.

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[27] Brief for the United States as Amicus Curiae Supporting Petitioners, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (filed Nov. 19, 2010) (No. 10-76) 2010 U.S. S. Ct. Briefs LEXIS 2114 at *12.

A. The United Kingdom

The English courts will only exercise civil jurisdiction where: (i) there is a connection between the defendant and England; or (ii) there is a connection between the substance of the claim and England;[28] or (iii) the parties have agreed or submitted to the jurisdiction of the English courts. Thus, a claimant may not initiate tort proceedings in England against a foreign defendant, unless the damage has either (a) been sustained within the jurisdiction, or (b) resulted from an act committed within the jurisdiction.[29]

However, the English courts may sometimes exercise jurisdiction over certain tort claims against a U.K.-incorporated parent company for acts committed by its foreign subsidiaries abroad, where the parent company actively supervised or participated in the foreign activity giving rise to the claim. Two examples illustrate situations where the English courts have allowed a claim based on such active personality jurisdiction:

- In *Lubbe and Others v. Cape Plc* [2000] UKHL 41, a group of South African workers made a negligence claim against a U.K.-incorporated parent company on the basis that the parent company exercised de facto control over the operations of its South African subsidiary. Since the parent company was incorporated in the U.K. and exercised a degree of control over

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[28] CMV Clarkson & Jonathan Hill, *The Conflict of Laws* 59, (Oxford University Press 4th ed. 2011).

[29] U.K. Civil Procedure Rules, 1998, Part 6, Practice Direction 6B, ¶ 3.1(9), *available at* http://www.justice.gov.uk/courts/procedure-rules/civil//rules/pd_part06b.

the subsidiary, there was a sufficiently close nexus with that State.[30]

- In *Guerrero v. Moneterrico Metals Plc*, [2009] EWHC 2475, an injunction was sought against another U.K.-incorporated parent company, alleging that it was negligent in protecting environmental protesters during the opening of a copper mine in Peru owned by its wholly-owned foreign subsidiary. In this case, the parent company's personnel directly participated in the running of the mine and its board of directors retained responsibility for risk management.

Importantly, the English courts will not take jurisdiction over civil claims that foreign individuals or foreign corporations committed "violations of international law" outside the U.K. Indeed, the House of Lords has explicitly rejected arguments that the English courts have jurisdiction in such cases, stating:

> "there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should. This is significant, since these are sources of international law." [31]

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[30] In addition, the corporate defendant in this case did not challenge the jurisdiction of the Court.

[31] *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26, para. 27 (leading judgment of Lord Bingham).

B. The Netherlands

The Netherlands also recognizes tort jurisdiction based on the territorial and active personality principles.[32] Based on the latter, the Netherlands already has a pending case brought by Nigerian plaintiffs against Royal Dutch Shell and its Nigerian subsidiary, in which the Court exercised extraterritorial jurisdiction over the Nigerian subsidiary because it had personal jurisdiction over the Dutch parent corporation.[33]

Dutch courts may, but only very rarely, exercise a special "forum of necessity" jurisdiction when a civil case outside the Netherlands appears to be impossible.[34] The exercise of such jurisdiction is available in extreme circumstances, such as natural disasters or

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[32] A.I.M. van Mierlo, C.J.J.C. van Nispen, M.V. Polak, Burgerlijke Rechtsvordering: de tekst van het Wetboek van Burgerlijke Rechtsvordering voorzien van commentaar ("Civil Procedure Commentary on the Code of Civil Procedure") (Kluwer 3rd ed. 2008). This general approach can be found in other civil law jurisdictions. *E.g.*, tort jurisdiction in Switzerland requires that (i) the acts concerned occurred on Swiss territory; or (ii) the defendant is a resident of Switzerland (natural person) or incorporated in Switzerland (corporations).[34] Swiss Federal Code of Private International Law, Compilation of Swiss Laws Number 291.0, art. 129.

[33] Rb. Gravenhage [Court of the Hague], 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC)(Neth.) *available at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BK8616. The Court exercised jurisdiction under Article 7(1) of the Dutch Code of Civil Procedure.

[34] *See* Dutch Code of Civil Procedure, Article 9(b), Wetboek van Burgerlijke Rechtsvordering, *available at* www.wetten.overheid.nl/BWBR0001827/geldigheidsdatum-02-06-2012.

civil war, as a result of which the judiciary in a country is not in a position to perform its functions.[35]

In addition, the Dutch courts may also exercise jurisdiction under the "forum of necessity" basis if two criteria are met. First, there must be a sufficient connection with the Dutch legal sphere *and* second, it would be unacceptable to demand from the plaintiff that he submits the case to the judgment of a foreign court.[36] A sufficient connection with the Dutch legal sphere exists, for example, if the plaintiff has his or her habitual residence in the Netherlands at the time an action is brought before the court.[37]

The judgment of March 21, 2012, in the Hague District Court is an example of such a case and is consistent with international law limits on jurisdic-

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[35] Tweede Kamer der Staten-Generaal, Herziening van het procesrecht voor burgerlijke zaken, in het bijzonder de wijze van procederen in eerste aanleg, kamerstukken II ("The Dutch House of Representatives, Revision of the Civil Procedure, specifically the rules of the procedure in the first instance, Parliamentary Documents II") 1999-2000, 26 855, nr. 3, p. 42, *available at* https://zoek.officielebekendmakingen.nl/kst-26855-3.html?zoekcriteria=%3fzkt%3dUitgebreid%26pst%3dStaatsblad%257cStaatscourant%257cTractatenblad%257cParlementaireDocumenten%26vrt%3dHerziening%2bprocesrecht%2bburgerlijke%2bzaken%26zkd%3dInDeGeheleText%252. In fact, we have been able to locate only one case in which Article 9(b) jurisdiction has been exercised by a Dutch court since its adoption on January 1, 2002; and that case involved Dutch citizens as both plaintiff and defendant. Rb. Utrecht [Court of First Instance of Utrecht] 12 maart 2008, Case 241446/HA ZA 08-27, *available at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC6477.

[36] Dutch Code of Civil Procedure, Article 9(c), *supra* note 34.

[37] Tweede Kamer der Staten-Generaal, *supra* note 35, at 43.

tion.[38] In this case, the plaintiff was a Bulgarian citizen who resided in the Netherlands and filed a lawsuit against individual Libyan citizens for acts that took place in Libya. However, in that case, Libya was the only alternative forum and the Hague District Court proceeded on the basis that it was not an adequate alternative forum that could administer the dispute. But the Hague District Court did assess the claims in accordance with Libyan law.

The "forum of necessity" concept also appears in some other civil law jurisdictions, but such jurisdiction generally cannot be invoked unless there is some genuine factual nexus to the forum.[39]

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[38] Rb. Gravenhage [Court of First Instance of the Hague] 21 maart 2012, m. nt. Van der Helm, Case 400882/HA ZA 11-2252 (El-Hojouj/Derbal) (Neth.), *available at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BV9748.

[39] Switzerland offers a particularly instructive example. Thus Article 3 of the Swiss Federal Code of Private International Law establishes a so-called "forum of necessity" in a case where two conditions precedent are met: (i) legal proceedings are not possible in foreign fora where clear and sufficient links exist; and (ii) there is a genuine link between the case and Switzerland. Swiss Federal Code of Private International Law, Compilation of Swiss Laws Number 291.0, art. 3. The requirement of a sufficient link to Switzerland is strictly applied. Thus, in the one known tort case in which Article 3 has been invoked by the plaintiff, no legal proceedings were possible where the tort(s) had occurred; and yet the Swiss Federal Tribunal refused to declare Swiss courts competent since there was no sufficient link to Switzerland. Decision of the Swiss Federal Tribunal of 22 May 2007, para. 3.4 (*Case number 4C.379/2006, available at* http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=22.05.2007_4C.379/2006).

IV. ALLOWING U.S. COURTS, AT THE BEHEST OF PRIVATE PLAINTIFFS, TO EXERCISE BROAD EXTRATERRITORIAL JURISDICTION IN ALIEN TORT STATUTE CASES OFTEN INTERFERES WITH THE RIGHT OF A NATION TO PRESCRIBE RULES FOR AND ADJUDICATE DISPUTES AMONG ITS OWN NATIONALS AND RESIDENTS THAT OCCUR ON ITS OWN TERRITORY

Because they regard the choices of legal processes and remedies as such important sovereign rights, the Governments object to the efforts of U.S. litigators and judges to bypass the legal systems of other sovereigns by deciding civil cases involving foreign parties where there is no significant nexus to the U.S. This was true in *Empagran*, it was true in *Morrison*, and it is true here.

A. A foreign State's legitimate concern about U.S. judicial interference with its sovereignty is clearly illustrated by the South African government's strong opposition to ATS claims based on the Apartheid policies of the predecessor government

The internationally-reviled Apartheid system generated a substantial number of large ATS class actions brought on behalf of the majority of South Africans who could qualify as Apartheid victims. These cases were principally against some international and South African banks and mining companies charged with aiding and abetting the Apartheid governments during their four decades of power.

The South African Government strongly opposed the continuation of these cases in a declaration submitted to the District Court by its Minister of Justice and Constitutional Development, the Honorable Penuell Mpapa Maduna on July 11, 2003.[40]

Minister Maduna explained that the new "government deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one...informed by the principles of reconciliation, reconstruction, reparation and goodwill."[41]

The South African Government opposed the pending ATS cases because they conflicted with its "reconciliation, reconstruction, reparation and goodwill" program in several fundamental ways. First, they directly interfered with "the right of the government to define and finalize issues of reparations, both nationally and internationally" by "set[ting] up the [ATS] claimants as a surrogate government."[42] Secondly, by singling out certain companies as defendants, the cases interfered with "[t]he government's policy...to promote reconciliation with and business investment by all firms, South African and

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[40] *See* Declaration by Penuell Mpapa Maduna (Minister of Justice and Constitutional Development of the Republic of South Africa) dated July 11, 2003 and attached to his letter of the same date to Judge John E. Sprizzo of the U.S. District Court for the Southern District of New York ("Maduna Declaration"), *available at* http://www.courtappendix.com/kiobel/protests/PDFs/2003-07-11%20-%20South%20Africa.pdf. For the convenience of the Court, it is attached as Appendix A to this brief.

[41] *Id.* para. 3.2.1 Apparently the Reconciliation Commission provided reparations to over 20,000 victims. *Id.* para. 3.2.3.

[42] *Id.* para. 7.

foreign..."[43] Thirdly, "[p]ermitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals."[44]

When President Thabo Mbeki submitted the final report of the Reconciliation Commission to Parliament, his words on his government's reaction to the faraway ATS litigation in New York could not have been clearer:

> "[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."[45]

B. The risks of improper interference with the rights of foreign sovereigns are significantly enhanced in ATS (and other) cases because the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept

This issue is not confined to ATS cases. The present case is one example of many in which foreign plaintiffs have sought to bring an essentially foreign dispute before U.S. courts, as they did in the cases giving rise to this Court's *Empagran* and *Morrison*

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[43] *Id.* para. 8.1.

[44] *Id.* para. 12.

[45] Speech on April 15, 2003 quoted in the Maduna Declaration at para. 3.2.3.

decisions involving the antitrust and securities laws. These plaintiffs seek to obtain the benefit of rules that the Governments and most other foreign sovereigns have not accepted.[46]

The special litigation advantages available in the U.S. are very familiar to this Court. *First*, the so-called "American rule" on litigation costs requires each side to bear its own costs—rather than requiring the losing plaintiff to reimburse some or all of the successful defendant's costs (and vice-versa).[47] The Governments regard the "loser pays" costs rules that prevail in their own courts as an important safeguard against marginal or frivolous litigation. *Secondly*, the generally broader discovery available to plaintiffs in the U.S. will tend to drive up the non-reimbursable litigation costs that an ultimately successful defendant will still have to bear.[48] *Thirdly*, the constitutional right to a jury trial in a civil case is generally not available elsewhere. Fear of large jury verdicts has been well recognized as a source of concern to large foreign corporations (hence driving them to

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[46] *See, e.g.*, the European Commission's discussion of efforts to achieve more balanced private litigation rules in its *White Paper on Damage Actions for Breach of EC Competition Rules*, COM (2008) 165.

[47] *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 252 (1975).

[48] *See Bell Atlantic v. Twombley*, 550 U.S. 544 (2007) (where this Court cited the burdens of discovery as one of the reasons for imposing enhanced standards on what a plaintiff had to be able to plead in order to survive a motion to dismiss under Fed. R. Civ. P.12(b)(6)).

settlements).[49] *Fourth*, punitive damages are available in the U.S., but generally are not allowed elsewhere.[50] *Fifth*, the "opt out" class action system provided for in the U.S. under FRCP Rule 23 and its State law counterparts has not been accepted by most other countries.[51] *Finally*, the U.S. has chosen to allow a much broader system of results-based contingent fees than the Governments and most other sovereigns have allowed in their court systems;[52] and this feature, when coupled with the "American rule" on costs, helps generate the kinds of large class actions that one sees in this case and *Rio Tinto*.

These rules and practices promote the kind of international forum shopping by foreign class action

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[49] *See* William Glaberson, *NAFTA Invoked to Challenge Court Award*, N.Y. Times, Jan. 28, 1999, *available at* http://www.nytimes.com/1999/01/28/business/nafta-invoked-to-challenge-court-award.html?pagewanted=all&src=pm (two leading U.S. international trade experts "noted that business leaders in other countries have for years complained that America's large jury verdicts make investment here unpredictable").

[50] *Id.* The $400,000,000 punitive damage award by a Mississippi jury on top of an actual damages award of $100,000,000 forced the Canadian defendant company into bankruptcy and prompted the NAFTA claim.

[51] Other countries that have authorized some form of collective redress still apply their normal "loser pays" cost rules as a way of discouraging opportunistic class litigation. This is true of the U.K. which has an "opt-in" class action system, and is equally true of the Netherlands and Australia, which are two of very few countries that allow class actions on an "opt out" basis.

[52] W. Kent David, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" In How It Pays Its Lawyers?*, 16 Ariz. J. Int'l & Comp. L. 361, 381-88 (1999) (discussing international disfavor with the contingency fee system and highlighting foreign alternatives).

plaintiffs that this Court has seen in cases such as *Empagran* and *Morrison*, as well as this case and *Rio Tinto*. As long as the U.S. continues to provide a unique plaintiff-favoring system, this Court must continue to play its traditional role of guardian of international comity.

C. There is ample evidence of international disputes generated by the efforts of private U.S. plaintiffs to attack foreign parties for activities outside the U.S.

The Governments and other States have had first-hand experience in dealing with what they regarded as entirely inappropriate exercises of U.S. extra-territorial jurisdiction by courts and, occasionally, by legislatures. Fortunately, such disputes seem to have become considerably less frequent and dramatic in recent years.

But the lessons of history should not be ignored. In the late 1970s and early 1980s, the private U.S. *Uranium Antitrust Cases* caused the Parliaments of the U.K., Australia, Canada and several other nations to enact so-called "blocking statutes", empowering their governments to prevent their nationals from complying with the discovery orders of U.S. courts.[53]

The disadvantages can flow the other way too. Foreign courts have also rejected discovery requests made by U.S. parties under the Hague Convention,

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[53] *See, e.g.*, Foreign Proceedings (Excess of Jurisdiction) Act No. 3 of 1984 (Austl.) and Protection of Trading Interests Act, 1980, c. 11 (U.K.), Foreign Extraterritorial Measures Act, R.S.C. c. F-29 (Canada); *see generally* Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247 (1982).

when the foreign court regards the U.S. case as being based on improper assertions of extraterritorial jurisdiction.[54]

The Governments hope that these kinds of disputes can be minimized in the ATS area if this Court continues to give substantial weight to international comity when making this important decision on extraterritorial jurisdiction for U.S. courts (as it has done in *Morrison* and the earlier cases discussed in the next section of this brief).

V. THIS COURT'S PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF U.S. STATUTES RECOGNISED IN *ARAMCO*, *EMPAGRAN*, AND *MORRISON* EMBODIED FUNDAMENTAL CONSIDERATIONS OF INTERNATIONAL COMITY AND SHOULD BE APPLIED TO THE JURISDICTION GRANTED TO U.S. COURTS BY THE ALIEN TORT STATUTE

A. The strong presumption against extraterritorial jurisdiction rests on concerns about international comity

In *Empagran* and *Morrison*, this Court enunciated a clear presumption against a cause of action created by a federal statute being construed to allow suit in the U.S. courts by foreign plaintiffs for injuries suffered abroad. It emphasized the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 130 S.Ct. at 2877, quoting

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[54] *See Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 2 W.L.R. 81 (H.L. 1977) (U.K.); *Gulf Oil Corporation v. Gulf Oil Canada Ltd.*, [1980] 2 S.C.R. 39 (Canada).

EEOC v. Arabian American Oil Company, 499 U.S. 244, 248 (1991). This avoids the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165 (2004).

The Petitioners' argument that, "[t]he presumption against extraterritoriality does not apply to jurisdictional statutes..." is incorrect.[55] There is no reason why the risks to international comity are somehow less when a statute is labeled "jurisdictional" rather than "substantive". The Governments respectfully suggest that the concerns about "unreasonable interference with the sovereign authority of other nations"[56] apply equally when a federal court is exercising its statutory jurisdiction over common law claims for "the modest number of international law violations with a potential for personal liability." *Sosa*, 542 U.S. at 724.

Additionally, piracy on the high seas is different from activities that take place on the territory of another sovereign, and does not generate the kinds of potential conflicts among sovereigns that the presumption against extraterritoriality is meant to guard against. Justice Breyer noted in his *Sosa* concurrence that "in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him." *Id.* at 762.

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[55] Petitioners' Supplemental Opening Brief at 34 (No. 10-1491) (filed June 6, 2012) ("Pet.'s Br.").

[56] *Empagran*, 542 U.S. at 164 (2004).

B. International comity considerations particularly weigh against exercising U.S. extraterritorial jurisdiction in ATS cases

Extraterritorial claims in ATS cases are particularly likely to generate international disputes among sovereigns because of the essential nature of these claims. In virtually every extraterritorial case, the plaintiffs allege violations of the "law of nations" by a foreign government which the defendant corporation is alleged to have aided or abetted. This kind of foreign sovereign involvement was not present as a complicating factor in *Aramco*, *Empagran*, or *Morrison* when the Court invoked the comity-driven presumption against extraterritorial application of ambiguous U.S. statutes.

Moreover, such extraterritorial ATS claims will be very difficult (and sometimes impossible) for a U.S. district court to try effectively. Critical evidence will mostly be located abroad, often in the hands of a challenged sovereign. Almost any private defendant, regardless of whether a foreign or U.S. national, will face great difficulty in obtaining (or even find it impossible to obtain) evidence needed to defend themselves against the relevant allegations, given such evidence is likely to be situated in the jurisdiction where the events occurred, including the evidence of any third party eye witnesses to the alleged wrong who still reside in the country where the wrong occurred.

C. The risks of jurisdictional disputes among sovereigns would be reduced if this Court were to require the use of the exhaustion of local remedies doctrine before a plaintiff could bring an ATS claim based on conduct in the territory of a foreign sovereign

Even if not necessary to the current decision, this case may offer the Court the opportunity to clarify the application of a principle that should be applied in ATS cases involving claims of extraterritorial jurisdiction. In *Sosa*, this Court acknowledged the principle of exhaustion of local remedies and confirmed that it "would certainly consider this requirement in an appropriate case." 542 U.S. at 733 n. 21. This is an appropriate case.

The principle of "exhaustion of local remedies" only becomes relevant (as an additional requirement) after the District Court has found that the ATS claims both (i) have sufficient factual nexus to the U.S. to satisfy the minimum public international law limits on the exercise of domestic jurisdiction by U.S. courts and (ii) fall within the narrow class of international wrongs foreseen by this Court in *Sosa*. The Governments submit that the application of the "exhaustion of local remedies" principle does not generate jurisdiction that would not otherwise exist in a U.S. court.

The principle of "exhaustion of local remedies", like the presumption against extraterritorial effects, has been applied by U.S. courts to show respect for the different choices that other sovereigns make on how to resolve disputes within their own jurisdiction. In other words, this has been applied as means of

minimizing jurisdictional conflicts with the courts of other States, to uphold international comity.

In these circumstances, the Governments' position is that, before a U.S. court is permitted to create common law liability based on some infringements of the "law of nations", it ought to be obliged to consider whether the place where the alleged violation occurred has a system for redressing such a wrong. Furthermore, the court ought to be obliged to consider whether another State has a closer nexus to the dispute—namely, superior access to evidence and/or the presence of nationals or residents as defendants within its jurisdiction. In the current case, if there were sufficient nexus to establish U.S. jurisdiction (which the Governments believe there is not), then respect for international comity should require the District Court to defer to other fora which have a sufficiently close connection to the facts in this case.

VI. PROTECTION AGAINST HUMAN RIGHTS ABUSES CAN BE MORE FAIRLY AND EFFECTIVELY ACHIEVED BY SEEKING INTERNATIONAL CONSENSUS AND CO-OPERATION THROUGH TREATIES THAN BY RESORT TO PRIVATE CIVIL LITIGATION IN DISTANT COURTS

The Governments fully supported the work of the Special Representative of the UN Secretary General on Business and Human Rights, John Ruggie, and the UN endorsement of his work in the UN Guiding Principles on business and human rights. The Governments also support international mechanisms such as the OECD Guidelines for Multinational Enterprises, which they believe can play an important role in the promotion of a corporate culture

consistent with human rights.[57] The Governments continue to be committed to this process of multilateral dialogue.

However, it has been the longstanding view of the Governments that the most effective way to ensure that there is no impunity for human rights abuses is to encourage and strengthen States to comply with the human rights obligations owed to those within their jurisdictions. Importantly, in many circumstances, international human rights law imposes a positive obligation on States to regulate corporations within their territory so they are prevented from committing human rights abuses against individuals or other private parties. This is not just a legal technicality: the Governments are concerned that, by allowing ATS claims with little nexus with the U.S., some States might be given reason to down-play or even ignore their own responsibilities for implementing their human rights law obligations. They will also come under less pressure to provide a remedy for, and indeed prevent, abuses, if plaintiffs have recourse to redress elsewhere.

To conclude, the Governments believe that it is entirely appropriate and desirable for a State to provide legal sanctions and remedies for human rights victims in its national courts where the wrong has taken place on its territory or was undertaken by some individual or entity properly subject to its jurisdiction under international law (*e.g.*, under the

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[57] For a list of references to efforts by the United Kingdom and Netherlands to promote international human rights, *see* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents (No. 10-1491) (filed Feb. 3, 2012) at p. 26-27 nn. 37-40.

nationality principle). These efforts can be quite varied based on particular circumstances in the country involved. Conversely, to permit international forum shopping of the type epitomized by this case, *Rio Tinto*, and numerous other ATS cases, will diminish the *pressures and incentives* on States to actually provide effective human rights remedies. In addition, in its current form, the ATS will also interfere with a State's *actual efforts* to remedy past wrongs within its own territory or which have been committed by its nationals.

Respectfully submitted,

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June 13, 2012

APPENDIX

APPENDIX

[LOGO]

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Our reference:
3/26/8/1 (HMS)

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[Filed S.D.N.Y. July 23, 2003]

The Honourable Mr Justice John E Sprizzo
United States District Judge
United States Court House
500 Pearl Street
New York, New York 10007
UNITED STATES OF AMERICA

Dear Judge

(a) SOUTH AFRICAN APARTHEID LITIGATION (MDL NO. 1499)

(b) KHULUMANI & OTHERS (03-4524)

I write to convey to the Honourable Court through my enclosed declaration the views of the Government of the Republic of South Africa regarding the South African apartheid litigation pending before the Court.

Respectfully yours

/s/ Dr P M Maduna, MP
DR P M MADUNA, MP
MINISTER

* Annexure

DECLARATION BY PENUELL MPAPA MADUNA

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbeki. I am an admitted attorney of the High Court of South Africa and hold the degrees of B.Juris, LL.B, LL.M as well as a LL.D in constitutional law.

2. I make this declaration to set forth the South African government's ("the government") view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, *In Re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y.) and *In Re Khulumani & others*, CV 02 5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the Republic. Under the Constitution, the judicial authority of the

Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission ("the TRC") in order to establish the truth in relation to "past events", the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their

perpetrators, and to make provision for amnesty for those who made full disclosure of such politically-motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a "victors' justice" approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20,000 victims of such abuses. In his address to Parliament on 15 April, 2003, on the tabling of the TRC Report, President Thabo Mbeki on behalf of the government, observed that:

> "In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation".

3.2.4 It is my respectful submission that the government's views on matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which, while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from

proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socio-economic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the

limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40% of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30% of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medical treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial increases have been made in providing state

financial support, especially to children, with more than eight million people expected to receive social assistance grants by 2005 compared with 2.7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26% of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise, a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative action, preferential procurement, and equity transfers in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government to the apartheid government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully. The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the claimants as a surrogate government. Accordingly, on 16 April 2003, the Cabinet, after extensive discussion of the matter at Cabinet committee level, resolved that:

> "It remains the right of the government to define and finalise issues of reparations, both nationally and internationally. In this regard, it is imperative for the government to clearly express its views on attempts to undermine South African sovereignty through

actions such as the reparations lawsuit filed in the United States of America by a US lawyer, Mr Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution ("Gear") strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5% per annum from 1994-2002, compared with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 per cent per annum since 1993.

8.3 The improved growth performance is still less than what is required to address successfully all the socio-economic legacies of apartheid—especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

- real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3%;
- from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44%. Further, formal houses constituted 48% of the total number of dwellings in 1996 and this proportion rose to 56% in 2001;
- the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50%. While 57% of all households used electricity for lighting in 1996, this proportion had risen to 70% by 2001;

- the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31%. As a result, by 2001 85% of all South African households had access to piped water within 200 metres of their homes;
- In 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16%. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50%.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US $ 133-million) Business Trust. Over five years, this business led initiative has improved the lives of 2.5 million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour.

At the summit, business agreed with government and labour to invest R145 billion (US $ 19 billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States—both the specific requests (such as for the creation of a historical commission and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts—are inconsistent with South Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony froth South Africans involved in various sides of the negotiated peace that

ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy, and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudicating cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the United States, and where adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its

interest in addressing its apartheid past presents just such a situation.

I declare, under penalty of perjury, under the laws of the United States, that the foregoing is a true and correct statement.

Signed on 11th July 2003.

/s/ Penuell Mpapa Maduna
PENUELL MPAPA MADUNA